RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
Petitioner,

v.

JAMES GARCIA DIMAYA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRANT DEFENSE PROJECT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

SEJAL R. ZOTA*
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
14 Beacon Street
Suite 602
Boston, MA 02108
(617) 227-9727
sejal@nipnlg.org

Counsel for Amici Curiae

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* Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

Amici are immigrant rights organizations with substantial interest in the Court's resolution of this case.

National Immigration Project of the National Lawyers Guild ("NIPNLG") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For 30 years, the NIPNLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct, litigated on behalf of noncitizens as *amici curiae* in the federal courts, and authored Immigration Law and Crimes and four other treatises published by Thompson-Reuters. NIPNLG has firsthand experience with the 18 U.S.C. § 16(b) issues presented here, having submitted a brief and participated in oral argument as *amicus* in the Court of Appeals in this case as well as other cases implicated in the circuit split that cert. was granted to resolve, *Golicov* v. *Lynch*, 837 F.3d 1065 (10th Cir. 2016); *Shuti* v. *Lynch*, 828 F.3d 440 (6th Cir. 2016).

Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), respondent Dimaya and the United States received timely notice of, and consented to, *amici curiae*'s filing of this brief. Their consent letters have been filed with this brief.

between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes.

American Immigration Lawyers Association (AILA) is a national association with more than 14,000 members, including lawyers and law school professors who practice and teach immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in immigration and naturalization matters. AILA's members practice before the Department of Homeland Security and Executive Office for Immigration Review, as well as before the Federal Courts.

Amicus National Immigrant Justice Center (NIJC) is a non-profit organization that the Board of Immigration Appeals has accredited since 1980 to provide immigration assistance. NIJC provides free and low-cost legal services to approximately 8,000 noncitizens per year, and represents hundreds of noncitizens who are placed into removal proceedings as a result of guilty pleas in state criminal courts. NIJC also offers no-cost training and consultation to criminal defense attorneys representing noncitizens, to train and advise regarding the immigration consequences of particular convictions.

As organizations defending the rights of immigrants in the nation's removal system, *amici* share a significant interest in ensuring that the rules governing classification of criminal convictions for removal purposes give noncitizens fair notice and comport with due process. *Amici* and its members have participated in litigation around the country on the vague-

ness of 18 U.S.C. § 16(b), and as *amicus curiae* in significant cases at the intersection of criminal and immigration law before this Court. See, *e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010). In their work, *amici* have observed the interpretative difficulties adjudicators and courts face in applying the wide-ranging and indeterminate inquiry required under § 16(b). Further, *amici* see the need for robust protections against vagueness in removal proceedings because of the serious practical difficulties they have observed in the system. The Court's decision in this case will directly affect the interests of the noncitizen clients of *amici* and *amici*'s members.

INTRODUCTION AND SUMMARY

Section 16(b) of title 18 of the United States Code, like the similarly-worded residual clause of the Armed Career Criminal Act (ACCA), is unconstitutionally vague because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime," which yields unpredictable and arbitrary results. *Johnson* v. *United States*, 135 S. Ct. 2551, 2557-58 (2015). The decision below therefore should be affirmed.

In this brief, *amici* focus on the negative effects that exist and will continue if the § 16 residual clause is upheld. First, *amici* show that widespread circuit and agency disagreement exist over the meaning of § 16(b) as applied in removal proceedings, and illustrate that questionable applications of § 16(b) inflict significant harm on noncitizens and unduly complicate the work of courts (*infra* § I). If § 16(b) survives,

divergent rulings will persist because it is impossible to apply this inherently vague law in a consistent manner. This is important because *Johnson* reaffirmed "that the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness." 135 S. Ct. at 2558 (quoting *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)).

Second, *Amici* show how the § 16 residual clause's vagueness exacerbates practical difficulties of noncitizens attempting to defend themselves against removal (*infra* § II). Many of these litigants, fighting to stay in a country their family has made home, are unrepresented, detained, and of limited English proficiency. Their task is arduous even when the removal charge is not vague. But, defending against removal under § 16(b) becomes an insurmountable barrier, even if they would otherwise have valid defenses.

Lastly, relying on their experience in removal cases, *amici* show that finding the § 16 residual clause unconstitutional will not, as the government contends, interfere with its efforts to remove dangerous criminal noncitizens. Even without § 16(b), the government has at its disposal an arsenal of removal grounds and other tools to achieve law, order, and security without violating the Constitution (*infra* § III).

Affirming the vagueness of the § 16 residual clause appropriately will help ensure that noncitizens will not be banished for life and forcibly separated from their families in violation of the due process clause of the Fifth Amendment.

ARGUMENT

I. INVALIDATING THE § 16 RESIDUAL CLAUSE WOULD RESTORE DUE PROCESS AND REDUCE ARBITRARINESS IN REMOVAL PROCEEDINGS.

Respondent Dimaya properly details that the § 16 residual clause parallels in all material respects the ACCA residual clause held unconstitutionally vague in *Johnson*. See Br. for Resp't at 12-39. Like the text of the ACCA residual clause, the language of § 16(b) provides little guidance on how to determine whether the imagined "ordinary case" of a given offense "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C § 16(b). And with § 16(b) too, inherent vagueness is evidenced by the courts' and factfinders' repeated "failure . . . 'to establish a standard'" for applying the statute across offenses and jurisdictions. *Johnson*, 135 S. Ct. at 2558 (quoting *L. Cohen Grocery Co.*, 255 U.S. at 91). The decisions applying § 16(b) and interpreting what it means for a risk to be "substantial" as applied to the hypothetical "ordinary case" are anything but standard: they strike dissonant chords across the Nation.

That is not surprising given the "ordinary case" analysis is anchored in an individual judge's hypothetical estimation of what a standard case *should* entail, rather than in the offense's statutory elements or the defendant's actual conduct. Indeed, in *Johnson*, the Court was flummoxed by this search for the ordinary or usual instance of a particular offense: "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" *Johnson*, 135 S. Ct.

at 2257-58 (quoting *United States* v. *Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)); see *Baptiste* v. *Att'y Gen.*, 841 F.3d 601, 611 (3d Cir. 2016) ("There is little guidance as to how we should go about identifying th[e] conduct ... associated with the *normal or usual* commission of the crime" in evaluating § 16(b) (emphasis added)).

Thus, what animated this Court to conclude that the ACCA residual clause was a "failed enterprise" applies equally here. *Johnson*, 135 S. Ct. at 2560. Just as the ACCA residual clause failed to guide courts in deciding what the "ordinary case" of a particular offense involves or how to measure the uncertain risk it poses, the § 16 residual clause has the same shortcomings and therefore also fails to satisfy the Constitution.

The examples outlined below, spanning a broad array of offense types, illustrate the profound confusion that courts experience when interpreting the § 16 residual clause. This confusion has led to unfair and arbitrary results in the courts, and a failure to provide fair notice or achieve predictable standards as required by the Constitution. Continuing the § 16(b) experiment will only create new conflicts given the indeterminacies built into the § 16 residual clause. As was the situation with the ACCA residual clause, there is "pervasive disagreement" among the courts and agency "as to the nature of the inquiry" and whether many particular offenses come within § 16(b). *Johnson*, 135 S. Ct. at 2560. Consistent with the conflicts identified in Respondent's brief 31-33, the disagreements highlighted below span a wide variety of criminal convictions, including residential trespass, unauthorized use of a vehicle, fleeing from an officer, unlawful imprisonment, stalking, reckless

offenses, and firearms possession. The only predictable outcomes are continued disagreements among the courts and continued harms to immigrants.

A. Residential Trespass.

In the Tenth Circuit, residential trespass is a crime of violence under the § 16 residual clause, because supposedly "[a] defendant will often encounter resistance either from occupants or structural barriers in 'entering or remaining' in someone's dwelling unlawfully, regardless of the defendant's intent in being there." *United States* v. *Venegas-Ornelas*, 348 F.3d 1273, 1278 (10th Cir. 2003). Typical of the approach in such residual clause cases, the Tenth Circuit did not look to underlying prosecutions or any other external metric to determine the risk inherent in the ordinary case of residential trespass.

Demonstrating a contradictory interpretation under the § 16 residual clause, the Seventh Circuit found that felony residential trespass does not involve a substantial risk of violence. *Zivkovic* v. *Holder*, 724 F.3d 894, 906 (7th Cir. 2013). In doing so, the Seventh Circuit judged the "ordinary case" in completely different terms from the Tenth Circuit, hypothesizing that because there is no "breaking or any other force" required, "[a] person could commit residential trespass by walking through a neighbor's open door under the mistaken belief that she is hosting an open house, a party, or a garage sale." *Id.* These conflicting interpretations of the same offense show the difficulty of deciding which scenario within the range of criminalized conduct is properly considered the ordinary case.

B. Unauthorized Use Of A Vehicle.

Because of the indeterminacy of § 16(b), the Fifth and Tenth Circuits have long found themselves in

conflict over how to interpret whether the crime of violence provision includes unauthorized use of a vehicle (the offense's elements generally are intentional or knowing operation of a motor vehicle without the owner's effective consent). Jose Serna Guerra fell victim to that conflict, and ultimately required this Court's intervention to prevent his deportation.

Mr. Serna Guerra is a native of Mexico who moved to the United States with his family as a lawful permanent resident in 1983. See *Serna-Guerra* v. *Mukasey*, 285 F. App'x 110 (5th Cir. 2008) (unpublished) (per curiam), *vacated*, 556 U.S. 1279 (2009); Br. for Pet'r, *Serna Guerra* v. *Mukasey*, 2008 WL 5649865, Statement of Facts (unpaginated) (5th Cir. Feb. 25, 2008). His two children, parents, and most of his siblings are United States citizens. *Id.*

In 1986, when Mr. Serna Guerra was twenty years old, he pled guilty to unauthorized use of a vehicle under Tex. Penal Code § 31.07 and was sentenced to five years-probation on a suspended sentence. *Id.* After Mr. Serna Guerra completed one-third of his probation, the court set aside the conviction. *Id.* He had no convictions thereafter and became a bus driver for the Laredo Independent School District.

Nonetheless, 18 years after his plea to unauthorized use, the federal government began deportation proceedings. It did so based on the contention that the unauthorized use conviction was an aggravated felony under § 16(b). *Id.* Both the immigration judge and Board of Immigration Appeals agreed. *Id.*

On appeal to the Fifth Circuit, Serna Guerra argued that a substantial risk of force does not inhere in the offense because there is no requirement of breaking into or taking of property by force. See, *e.g.*, *Coleman* v. *Texas*, No. 11-06-00155-CR, 2008 WL

97051 (Tex. Ct. App. Jan. 10, 2008) (convicting defendant for operating a vehicle beyond the time allotted by the vehicle's owner); *Wilborn* v. *Texas*, No. 12-06-00258-CR, 2007 WL 2381376 (Tex. Ct. App. Aug. 22, 2007) (same).

The Fifth Circuit affirmed the Board, but only because it was bound by prior precedent holding that unauthorized use was a crime of violence under § 16(b). See *Serna-Guerra*, 285 F. App'x at 111 (citing *United States* v. *Galvan-Rodriguez*, 169 F.3d 217, 219 (5th Cir. 1999)). The Fifth Circuit's rule was premised on speculation that:

> [T]here is a strong probability that the inexperienced or untrustworthy driver who has no pride of ownership in the vehicle will be involved in or will cause a traffic accident or expose the car to stripping or vandalism. In fact, when an illegal alien operates a vehicle without consent, a *strong probability* exists that the alien may try to evade the authorities by precipitating a high-speed car chase and thereby risking the lives of others, not to mention significant damage to the vehicle and other property.

Galvan-Rodriguez, 169 F.3d at 219-20 (emphasis added).

Despite affirming, the panel in Serna Guerra's case overtly disagreed with this view of the ordinary case of unauthorized use and the risk it presented. See *Serna-Guerra*, 285 F. App'x at 113. Rather, it agreed with the Tenth Circuit that such offenses *do not* present a substantial risk of violence. See *United States* v. *Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007). The Tenth Circuit had conceptualized the "ordinary case" in completely different terms from the Fifth Circuit, reasoning that Arizona's unlawful use of

means of transportation presented a *low* probability of violence because it "encompasses a broad range of conduct that does not present any risk of such force being used" such as driving a rental vehicle past the expiration of the rental agreement, borrowing a car that he or she knows is stolen, or taking another's keys and going joyriding. 501 F.3d at 1213 (emphasis in original).

This Court vacated the judgment and remanded the case in light of *Chambers* v. *United States*, 555 U.S. 122 (2009), an ACCA case. *Serna-Guerra* v. *Holder*, 556 U.S. 1279 (2009). Upon remand, the Fifth Circuit reversed and found that the offense contained "no essential elements of violent and aggressive conduct" under *Chambers* or *Begay*, and therefore did not fall under § 16(b). *Serna-Guerra* v. *Holder*, 354 F. App'x 292 (5th Cir. 2009) (unpublished) (per curiam). Almost two years later, the immigration judge dismissed all immigration charges against Mr. Serna Guerra. He immediately filed for citizenship and naturalized one year later.

Mr. Serna-Guerra was able to defeat his deportation after seven years of litigation at his own expense and after a rare remand by this Court. But his case demonstrates the ambiguity inherent in § 16(b). It also confirms that the interpretive confusion surrounding § 16(b), like with the ACCA residual clause, has mirrored this Court's struggles to settle on a consistent standard.

C. Fleeing From An Officer.

The courts and the Board of Immigration Appeals also conflict over applying the § 16 residual clause to fleeing from an officer; that offense generally requires willfully eluding or failing to stop for a police officer, knowing that the officer has signaled the vehicle to

stop. The Board continues to apply the reasoning of this Court's now-overruled ACCA residual clause decision in *Sykes* v. *United States*, 564 U.S. 1 (2011), which relied on national statistics to "confirm the *commonsense* conclusion that . . . vehicular flight crime is a violent felony." *Id.* at 10 (emphasis added), *overruled by Johnson*, 135 S. Ct. 2551. For instance, Constantine Fedor Golicov was ordered deported by the BIA based on *Sykes*, and his fate likely rests on the outcome in the instant case.

Mr. Golicov is a thirty-year old Moldova national. See *Golicov* v. *Lynch*, 837 F.3d 1065, 1067 (10th Cir. 2016), *rehearing denied*, No. 16-8530, slip op. (10th Cir. Nov. 4, 2016). He has been a permanent resident for fifteen years. *Id.* In 2012, the government charged him as an aggravated felon under § 16(b) based on a conviction for failing to stop at an officer's command. *Id.* The Board reversed the immigration court's decision that the failure to stop offense did not fall within § 16(b). See *In re Golicov*, No. A047-547-785 (B.I.A. July 27, 2015). Despite this Court's decision in *Johnson*, relying on *Sykes* and other ACCA residual clause cases, the Board concluded that "the offense will, in the ordinary case, create a risk of direct confrontation with the police." *Id.* at 4. On appeal, the Tenth Circuit declared § 16(b) void for vagueness because it "substitutes guesswork and caprice for fair notice and predictability." *Golicov*, 837 F.3d at 1075 (citing *Shuti* v. *Lynch*, 828 F.3d 440, 450 (6th Cir. 2016)).

Should this Court reverse here and then vacate and remand the Tenth Circuit's decision, the court of appeals will be faced with the unanswerable question of whether the ordinary case of fleeing an officer presents a substantial risk of violence. The Tenth Circuit would have to choose between the two diverging circuit approaches discussed below. No matter which

approach it endorses, the Tenth Circuit's decision will create a 2-1 split ripe for this Court's review.

The Eleventh Circuit has reached the same result as the Board based on *Sykes*. See *United States* v. *Coronado-Cura*, 713 F.3d 597 (11th Cir. 2013). There, the court intuited that the ordinary case of fleeing creates high risks of "car crashes," even where the statute is silent as to a disregard for the safety of others. *Id.* at 600.

The Ninth Circuit has come to a contrary conclusion. In *Penuliar* v. *Mukasey*, it held that willfully fleeing an officer where the vehicle is driven in a willful or wanton disregard is not categorically a crime of violence under § 16(b). 528 F.3d 603, 610-11 (9th Cir. 2008). In so holding, the Ninth Circuit conceptualized the ordinary case based on the *minimum* required for conviction—willfully fleeing while disregarding the safety of others by negligently committing three traffic violations. *Id.* Thus, the Ninth Circuit reached the opposite conclusion by focusing solely on the risk of violence emanating from the manner in which the car was being driven, *without* assuming that the fleeing itself presents a substantial risk of violence.[2]

D. Unlawful Imprisonment.

The Second, Fifth, and Seventh Circuits have held that false imprisonment of a child without the consent of her legal guardian does not come within the § 16 residual clause. See *United States* v. *Franco-*

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[2] The Ninth Circuit in an ACCA case later held that *Penuliar* "is no longer good law in light of the Supreme Court's decision in *Sykes*." *United States* v. *Martinez*, 771 F.3d 672, 677 (9th Cir. 2014) (per curiam). This Court, however, vacated that decision in light of *Johnson*. *Martinez* v. *United States*, 135 S. Ct. 2939 (2015). Thus, *Penuliar* is once again the rule in the Ninth Circuit.

Fernandez, 511 F.3d 768, 772 (7th Cir. 2008) (holding that child abduction by a putative father does not fall under § 16(b) because "the offense specifically targets nonforcible conduct ... without regard to the victim's resistance, consent, or acquiescence."); *Dickson* v. *Ashcroft*, 346 F.3d 44, 52 (2d Cir. 2003) (holding that unlawful imprisonment offense is not categorically a crime of violence under § 16(b)" and thus modified approach applies); *Kerr* v. *Holder*, 352 F. App'x 958 (5th Cir. 2009) (per curiam) (applying same analysis).

Those circuits concluded that an offense which covers a child who acquiesces or consents in fact to the confinement does not present a *substantial* risk of force. As the Fifth Circuit has reasoned, while "[t]here is certainly a possibility that physical force *might* result from a parent whose child is confined without the parent's consent ... such force is not necessarily required to commit the offense." *Kerr*, 352 F. App'x at 964 (emphasis added). In other words, these courts have assessed the risk inherent in the most benign conduct that could be prosecuted in determining the ordinary case.

The Ninth Circuit has taken a different approach by hypothesizing what the typical kidnapping/unlawful imprisonment case looks like. See *Delgado-Hernandez* v. *Holder*, 697 F.3d 1125 (9th Cir. 2012). Kidnapping under California law is "tak[ing] by force or fraud." But in 2003, the California legislature eliminated the requirement of "force" in a kidnapping that involves a small child. *Id.* at 1128-29. While acknowledging that "a non-custodial parent who refuses to return with her children from a vacation" does not entail a substantial risk of force, the court found that the change in the law does not represent the "ordinary case" of kidnapping, but merely sets a "lower *limit*." *Id.* at 1129 (emphasis in origi-

nal). The Court then concluded that the ordinary case of the offense met the requisite risk threshold after surveying how the generic crime of kidnapping is characterized in the majority of jurisdictions, divorced from the elements of the California offense. *Id.* at 1132-33.

E. Stalking.

The Board of Immigration Appeals and the Ninth Circuit have clashed as to whether stalking is a crime of violence. In *Malta-Espinoza* v. *Gonzales*, 478 F.3d 1080, 1083-84 (9th Cir. 2007), a split Ninth Circuit panel found that stalking does not present a substantial risk of violence against the victim because the offense can be committed long-distance through pictures and letters and because no proof is required that the defendant intended to carry out threats. But upon remand, the BIA disagreed with the Ninth Circuit and relied on *Sykes* to hold that stalking comes within § 16(b) because specific prosecutions and national stalking statistics indicate that the ordinary case does present a substantial risk of confrontation and violence). See *Matter of Singh*, 25 I. & N. Dec. 670, 677-79 (B.I.A. 2012).

E. Reckless Offenses.

As detailed in Respondent Dimaya's brief, the circuits also split on whether reckless offenses come within the § 16 residual clause. See Br. for Resp't at 25-27. Meanwhile, the BIA continues to deport people, such as Ms. Felipa Salazar-Moreno, for reckless offenses depending on the law of the circuit of appeal.

In 1976, Ms. Felipa Salazar-Moreno moved to the United States as a young girl. For 38 years, she lawfully resided here as a permanent resident until being deported in 2014. See Appellant's Brief in Support of Appeal of Pretermission of Application for Re-

lief at 2, *Matter of Salazar-Moreno*, No. A 035-305-657 (B.I.A. Oct. 23, 2013) (hereinafter "Appellant's Br.") Her entire family, including her two United States citizen children, all reside in the United States. She has spent much of her life working as a cafeteria worker in the public schools.[3]

In 2011, Ms. Salazar-Moreno was intoxicated at her home, when the police knocked on her door after receiving a noise complaint. In response, Ms. Salazar-Moreno swung open the storm door and in the process injured the arm of the officer. As a result, she pled guilty to Assault on a Public Servant in violation of Texas Penal Code § 22.01, which penalizes intentionally, knowingly, or recklessly causing injury to a police officer. Voluntary intoxication is not a defense. She received a suspended sentence of eight years to be served on probation.

In 2013, the federal government sought to deport Ms. Salazar-Moreno as an aggravated felon under § 16(b). She argued that her offense did not come within § 16(b) because she had been convicted of a reckless act, which does not qualify as a "use" of force. See Appellant's Br. at 6-7. As support, she pointed to *United States* v. *Zuniga-Soto*, in which the Tenth Circuit had found, in evaluating reckless assault under Texas law, that reckless offenses did not come within §16(a) or § 16(b). 527 F.3d 1110, 1124 (10th Cir. 2008).

Nonetheless, the Board of Immigration Appeals affirmed an immigration judge's decision finding her deportable. See *In re Salazar-Moreno*, 2013 WL 6529317, *2 (B.I.A. Dec. 3, 2013) (unpublished). In

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[3] The facts of Ms. Salazar-Moreno's case are detailed in a declaration by her attorney on file with counsel of record. Decl. of John Bray, Esq. of Oosterhof & Bray, PLLC (Dec. 17, 2016).

doing so, the Board relied on a sentencing guidelines case, in which the Fifth Circuit held that Texas reckless assault creates a "serious potential risk of physical *injury* to another." *Id.* at *1 (citing *United States* v. *Anderson*, 559 F.3d 348, 355 (5th Cir. 2009) (emphasis added)). Unlike the Tenth Circuit, the Board, in interpreting § 16(b), has found the touchstone is "not on the mens rea of the crime itself," but instead "whether there is a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime."[4] See *Matter of Singh*, 25 I. & N. Dec. at 677. Ms. Salazar-Moreno could not afford to appeal the decision and was deported.

G. Firearms Possession.

The courts also struggle to apply the § 16 residual clause to various firearm possession crimes. Again, this disagreement stems from the different approaches courts take to imagining how the hypothetical "ordinary case" of the offense plays out and the risk presented.

The Ninth Circuit has held that a federal conviction for possession of an unregistered firearm is a crime of violence under § 16(b) because it is "presumptive evi-

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[4] Applying § 16(b) in a manner that gives fair notice becomes even more difficult when evaluating an offense, such as Ms. Salazar-Moreno's, that proscribes both intentional and reckless conduct. Even if the noncitizen's conduct was reckless, and the circuit law holds that reckless conduct does not come within § 16(b), courts must assess the risk inherent in the "ordinary case" of the offense. A court could surmise, as the Third Circuit has, *see Baptiste*, 841 F.3d at 614, that for a statute that covers such a wide swath of conduct—both intentional and reckless—that the "ordinary case" "presumptively lies at or near the middle" of the spectrum of offenses and thus presents a risk of violence. *Id.*

dence of unlawful violent intentions and, therefore, involves the substantial risk of violence[.]" *United States* v. *Dunn*, 946 F.2d 615, 620–21 (9th Cir. 1991). Relying on gut instinct, the Court did not look to underlying prosecutions or any other external metric to determine the risk inherent in the ordinary case of the offense.

Accordingly, the Board continues to find and the Government continues to assert in cases arising in the Ninth Circuit that firearm possession offenses satisfy § 16(b). Notwithstanding the Government's contention here that there is agreement post-*Leocal* that such offenses *do not* present a substantial risk of violence in the course of committing the offense, see Br. for the United States at 33-34, it is *currently* arguing the opposite to the Ninth Circuit—that possession of a short-barreled shotgun satisfies § 16(b) because of "the criminal and violent nature of the weapon itself and the probability that someone who possesses such a weapon will, in the ordinary case, actually use it during the course of possession."[5]

Two other circuits, by contrast, have not hypothesized that the ordinary case of possession of a short-barreled gun involves a substantial risk of violence because "physical force against the person or property of another need not be used to complete [that] crime' ... [i]nstead, it is complete upon ... mere knowing possession of the weapon." *United States* v. *Diaz-Diaz*, 327 F.3d 410, 414 (5th Cir. 2003) (quoting *United States* v. *Hernandez-Neave*, 291 F.3d 296, 299 (5th Cir. 2001). See *United States* v. *Serafin*, 562 F.3d 1105, 1107 (10th Cir. 2009).

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[5] Answering Brief at 17, *Patel* v. *Lynch*, (No. 13-70289) (9th Cir. Apr. 14, 2014), ECF No. 29 (on appeal and awaiting the outcome in the instant case).

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Taken together, these examples demonstrate how removability based on § 16(b) for a noncitizen convicted of any number offenses is neither consistent nor predictable. Whether the noncitizen is deported turns on the fortuity of where immigration removal proceedings happen to be initiated. And where the proceedings are initiated often turns on where the noncitizen is detained, which may not correspond with the state and circuit in which he or she resides or was convicted. See, *e.g.*, *Ballesteros* v. *Ashcroft*, 452 F.3d 1153, 1157 (10th Cir. 2006). In other words, a noncitizen could plead guilty to an offense, relying on the favorable interpretation under the law of the circuit in which she is convicted. But the government is free to initiate removal proceedings elsewhere—including a circuit that has reached the opposite conclusion due to the confusion generated by § 16(b).

Invalidating the § 16 residual clause would eliminate arbitrarily different results in materially indistinguishable cases and would more adequately put immigrants on notice as to offenses that trigger removal.

II. THE REMOVAL SYSTEM'S STRUCTURAL DIFFICULTIES EXACERBATE THE NOTICE PROBLEMS AND ARBITRARINESS BUILT-INTO THE § 16 RESIDUAL CLAUSE.

Section 16(b)'s notice and arbitrary enforcement problems, which parallel those addressed in *Johnson*, 135 S. Ct. at 2256, are exacerbated in the removal context. Unlike the ACCA setting, which offers significant procedural protections to criminal defendants, noncitizens in the removal system face numerous serious practical difficulties, including lack of counsel, detention, language barriers and summary proceed-

ings.[6] Given the conflicting guidance, speculation, and subjectivity built into the § 16(b) inquiry, attempting to litigate the question of what amount of risk a hypothetical, ordinary case of a given crime entails is necessarily an arduous task even for attorneys well-versed in immigration law. But for noncitizens in removal proceedings, defending such a charge becomes an insurmountable hurdle for several reasons.

First, noncitizens in removal proceedings have no statutory right to government-appointed counsel. 8 U.S.C. §§ 1229a(b)(4)(A), 1362. Forty-five percent of noncitizens in removal proceedings before an immigration judge are unrepresented.[7] Many cannot afford counsel on their own, and unrepresented immigrants often lack an adequate understanding of the legal standards at issue in their cases, let alone the complexities in the case law set forth above. This leads to significantly different outcomes; noncitizens with lawyers are far more likely to prevail in their cases than those without lawyers.[8]

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[6] In light of these concerns, this Court has repeatedly upheld a strong elements-based categorical approach. *See Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1987 (2015); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013). The categorical approach promotes many of the same concerns animating the vagueness doctrine here, "efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 135 S. Ct. at 1987. However, the unique iteration of the categorical approach baked into § 16(b)—the ordinary case approach—undermines these very objectives.

[7] U.S. Dep't of Justice, Exec. Office of Immigration Review, *FY 2014 Statistics Yearbook*, F1, fig. 10 (2015) ("EOIR" Yearbook), http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf (hereinafter "*FY 2014 Statistics Yearbook*").

[8] *See, e.g.*, Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev.

Second, noncitizens merely *charged* as removable under § 16(b) are subject to mandatory detention during the entire course of removal proceedings, § 1226(c), in facilities that are indistinguishable from jail or prison. Indeed in 2013, the Government detained over 440,000 noncitizens in removal proceedings.[9] Those in detention are even less likely to be assisted by counsel; from 2007 to 2012, only 14 percent of detained noncitizens had lawyers.[10] Thus, the vast majority are forced to proceed *pro se* and will fail to receive any legal assistance in defending against § 16(b). Without counsel, detainees are unable to research, gather, and present evidence that is critical to defending a charge of deportability under § 16(b).

Moreover, a detained noncitizen proceeding pro se will rarely (if ever) have the necessary resources to counter a charge that his or her conviction comes

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357, 363-64 (2011) (finding that amongst nondetained immigrants, 74 percent with counsel have successful outcomes versus 13 percent success rate without counsel; and that amongst detained immigrants, 18 percent with counsel have successful outcomes versus 3 percent success rate without counsel) (hereinafter "*Accessing Justice*").

[9] John F. Simanski, U.S. Dep't of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2013*, 5 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

[10] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 (2015). Even those who do have counsel have difficulty communicating with their attorneys. For example, in 2010, 78 percent of detainees "were in facilities where lawyers were prohibited from scheduling private calls with clients." Nat'l Immigrant Justice Ctr., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court*, 4 (2010), http://www.immigrantjustice.org/sites/default/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf.

within § 16(b). Detainees' access to legal materials is significantly restricted. For example, the government's detention standards do not provide for access to state-specific legal materials that would be needed to ascertain the "ordinary case."[11] Further, detainees typically have little to no access to email or the internet,[12] and only limited access to telephone or fax.[13] These access limitations thwart a noncitizen's ability to compile evidence and engage in the sophisticated multi-step legal analysis necessary to rebut such a charge. See *e.g.*, *Moncrieffe*, 133 S. Ct. at 1690 (recog-

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[11] *See* 2011 Operations Manual ICE Performance-Based National Detention Standards, Part 6, Appendix 6.3A (List of Legal Reference Materials for Detention Facilities), 410-13, (as modified by February 2013 Errata), http://www.ice.gov/doclib/detention-standards/2011/law_libraries_and_legal_material.pdf (hereinafter "Operations Manual"). Moreover, a 2009 study reported that "29 [immigration] detention facilities lacked an actual law library" and "27 facilities inappropriately limited detainees' access to their law libraries." Nat'l Immigration Law Ctr. *et al.*, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* 33-34 (2009), https://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf (hereinafter "*A Broken System*").

[12] *See, e.g.*, Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – A Two Year Review* 40 (2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf; Northern California Collaborative for Immigrant Justice, *Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California*, 20 (2014), http://law.stanford.edu/wpcontent/uploads/sites/default/files/publication/773705/doc/slspublic/11-4-14-Access-to-Justice-Report-FINAL.pdf

[13] *See* Operations Manual at Part 5.6 (Telephone Access); *see* U.S. Gov't Accountability Office, *Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities*, at 5 (2007), http://www.gao.gov/assets/270/263327.pdf.

nizing that noncitizens in detention "have little ability to collect evidence").

Third, language barriers further exacerbate the difficulties noncitizens would face under the continued application of § 16(b). For the approximately 85 percent of noncitizens in removal proceedings not fluent in English,[14] it is demonstrably more difficult, particularly for those who are *pro se*, to understand the intricacies of assessing the risk inherent in the hypothetical, ordinary case of their offense of conviction.

Fourth, noncitizens without lawful permanent resident status[15] charged as aggravated felons are subject to summary removal procedures known as "administrative removal" that bypass the immigration courts and depend on low-level officers to make sophisticated legal determinations regarding the nature of the conviction. See 8 U.S.C. § 1228(b). This fast-track procedure is essentially a paper process without a formal hearing and corresponding protections.[16] It leaves the noncitizen with only ten days to rebut the government's charge. 8 C.F.R. § 238.1(b)(2). During this process, noncitizens are not even advised that

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[14] *FY 2014 Statistics Yearbook*, at E1, fig. 9.

[15] This group includes noncitizens with conditional lawful permanent residence, who acquired status through less than two years of marriage. 8 U.S.C. § 1228(b)(2)(B).

[16] Accordingly, the noncitizen does not have a right to call witnesses, cross-examine the government's witnesses, or make any sort of in person argument. 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1. A non-lawyer immigration officer plays the roles of both prosecutor and judge, deciding that the noncitizen's conviction qualifies as an aggravated felony based on documentary evidence. 8 C.F.R. §§ 238.1(d); 1003.1(b). And once the Department of Homeland Security (DHS) issues the Final Administrative Removal Order, the noncitizen has no statutory right to take an administrative appeal.

they may challenge the aggravated felony designation.[17]

In 2013, the government removed 9,217 noncitizens through this fast-track-process.[18] This group of detained noncitizens would logically lack access to counsel in even greater numbers because of the limited window—ten days—to defend the charge.[19] Their ability to retain private counsel or secure pro bono representation also depends on regular access to the mail and telephone. Yet, reports show that facilities frequently lack a sufficient number of phones and restrict the number and duration of calls.[20]

Further, the risk of arbitrary enforcement soars with low level officers, neither schooled in law nor precedent, making determinations as to whether specific offenses satisfy § 16(b)'s wide-ranging inquiry. See, *e.g.*, Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. Cal. L. Rev. 101 (forthcoming 2017). If courts have concluded that they can-

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[17] *See, e.g., Valdiviez-Hernandez* v. *Holder*, 739 F.3d 184, 187 (5th Cir. 2013).

[18] *See* Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 Colum. J of Race & L. 1, 3-4 (2014).

[19] *See Accessing Justice* at 410 (noting that while there is no data on the percentage of noncitizens in administrative removal proceedings who are represented, "anecdotal evidence suggests that almost none d[o], despite the likelihood that some ha[ve] valid legal claims"). Indeed, the ten-day window to rebut the aggravated felony charge is not subject to the "prison mailbox rule." *Houston* v. *Lack*, 487 U.S. 266 (1988) (treating the date that pro se prisoner's appeal entered the prison mail system as the filing date); *see In re J-J-*, 21 I. & N. Dec. 976, 982-83 (B.I.A. 1997).

[20] *See A Broken System* at 28.

not apply this direction-less standard consistently, it's hard to see how line officers could do so. *Id.*

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It may be that these difficulties—lack of counsel, detention, language barriers, and fast-track proceedings—would be surmountable in isolation. For example, if noncitizens charged with § 16(b) were not detained, their ability to fight the charges might mitigate against the arbitrary enforcement. But taken together, these structural difficulties compound the problems of notice, arbitrariness, and unintelligibility built-into the § 16 residual clause and demonstrate a need for robust vagueness protections in immigration proceedings. See Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 Wis. L. Rev. 101, 128-33 (forthcoming 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2846572). Accordingly, the Court should declare § 16(b) unconstitutionally vague.

III. INVALIDATING THE § 16 RESIDUAL CLAUSE WOULD NOT FORECLOSE REMOVAL IN MANY INSTANCES GIVEN THE MANY ALTERNATE REMOVAL GROUNDS.

The government in its opening brief warned that "deleterious" consequences would come to pass should this Court invalidate the § 16 residual clause. Br. of U.S. at 52-55. But even assuming that the government's enforcement priorities are relevant to the constitutional inquiry before the Court, the government considerably overstates the potential consequences of a ruling upholding the decision below. Section 16(b) is a catch-all, and the government could still—and already often does—turn to one of many alternative, constitutional grounds of removal. The following sections illustrate that invalidating § 16(b) will not sig-

nificantly inhibit the ability of the government to deport noncitizens. *Amici* merely ask that due process be honored, and that noncitizens be permitted fair opportunities to defend against deportation.

A. The Existence Of Other Aggravated Felony Grounds Subject To Mandatory Removal Would Mitigate The Impacts About Which The Government Complains.

The government protests that invalidating the § 16 residual clause would undo the severe consequences associated with an aggravated felony, including mandatory and permanent removal.[21] But as Respondent has observed, see Br. of Resp't at 58-59, nothing prevents the government from charging these noncitizens with other applicable aggravated felony grounds from the twenty at its disposal, including 18 U.S.C. § 16(a), the "elements clause" of the crime of violence provision.

Courts have found that falling within § 16(a) are some of the most common offenses typically associated with "violence," including:[22]

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[21] A conviction for an aggravated felony renders noncitizens deportable, 8 U.S.C. § 1227(a)(2)(A)(iii); bars many forms of discretionary relief from removal, including asylum, cancellation of removal, and voluntary departure, even where the individual's positive equities, evidence of rehabilitation, and humanitarian, family unity or non-refoulment interests would merit favorable discretion, 8 U.S.C. §§ 1158(b)(2)(A)(ii) and (B)(i), 1229b(a)(3) and (b)(1)(C), 1229c(b)(1)(C); subjects noncitizens to mandatory detention during removal proceedings, 8 U.S.C. § 1226(c); authorizes an abbreviated removal procedure for non-LPRs, 8 U.S.C. § 1228(b); and precludes some noncitizens from qualifying for naturalization, 8 U.S.C. § 1101(f)(8), 1427(a).

[22] In many of these cases, the courts and agency found that the same offense came within both § 16(a) and § 16(b). In other

- *Assault offenses.* See *Roberts* v. *Holder*, 745 F.3d 928, 931 (8th Cir. 2014) (third-degree Minnesota assault); *Camacho-Cruz* v. *Holder*, 621 F.3d 941 (9th Cir. 2010) (Nevada assault with a deadly weapon); *United States* v. *Heron-Salinas*, 566 F.3d 898, 899 (9th Cir. 2009) (California assault with a firearm); *Singh* v. *Holder*, 568 F.3d 525, 529-30 (5th Cir. 2009) (Virginia unlawful wounding).
- *Domestic battery.* See *De Leon Castellanos* v. *Holder*, 652 F.3d 762 (7th Cir. 2011).
- *Assault with intent to commit rape.* See *Matter of Ramon Martinez*, 25 I. & N. Dec. 571 (B.I.A. 2011).
- *Arson.* See *Mbea* v. *Gonzales*, 482 F.3d 276 (4th Cir. 2007).
- *Carjacking.* See *Nieves-Medrano* v. *Holder*, 590 F.3d 1057, 1058 (9th Cir. 2010).
- *Aggravated discharge of a firearm.* See *Quezada-Luna* v. *Gonzales*, 439 F.3d 403, 406 (7th Cir. 2006).
- *Communicating threats/menacing.* See *Arellano Hernandez* v. *Lynch*, 831 F.3d 1127 (9th Cir. 2016) (California making terroristic threats); *Damaso-Mendoza* v. *Holder*, 653 F.3d 1245, 1248 (10th Cir. 2011) (Colorado menacing).
- *Pointing firearm at another.* See *Reyes-Soto* v. *Lynch*, 808 F.3d 369 (8th Cir. 2015).

Thus, the invalidation of § 16(b) will in no way impact the government's ability to remove noncitizens for offenses that contain an *actual element* of force.

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cases, where they found § 16(a) satisfied, courts found it unnecessary to reach the question of § 16(b).

B. Non-Aggravated Felony Removal Grounds Also Remain Readily Available To The Government

Moreover, invalidating the § 16 residual clause would not preclude the government from removing noncitizens under non-aggravated felony grounds. See *Moncrieffe*, 133 S. Ct. at 1692 ("Escaping aggravated felony treatment does not mean escaping deportation . . . [i]t means only avoiding mandatory removal."). Indeed, the government could still remove a noncitizen for a "crime involving moral turpitude" (8 U.S.C. § 1227(a)(2)(A)(i) and (ii)); a firearms offense (8 U.S.C. § 1227(a)(2)(C)), a crime of child abuse, stalking, or violation of a protection order (8 U.S.C. § 1227(a)(2)(E)); any criminal activity that endangers public safety or national security (8 U.S.C. § 1227(a)(4)(A)); or terrorist activities (8 U.S.C. § 1227(a)(4)(B)).

For example, the Third Circuit recently invalidated § 16(b) as unconstitutionally vague, but found that the noncitizen's conviction for reckless aggravated assault is a crime involving moral turpitude. See *Baptiste*, 841 F.3d at 623. Similarly, in *Jimenez-Gonzalez* v. *Mukasey*, the Seventh Circuit suggested that, while reckless discharge of a firearm does not come within § 16(b), it is likely a firearms offense. 548 F.3d 557, 563 (7th Cir. 2008). See also *Quezada-Luna*, 439 F.3d 403 (noting that noncitizen conceded his conviction for aggravated discharge of a firearm qualified as a firearms offense, but contested only that it is a § 16(b) offense); *Idowu* v. *Att'y Gen. of U.S.*, 512 F. App'x 222, 225 (3d Cir. 2013) (not reaching the issue of a crime of violence, but finding that convictions for second-degree eluding conviction and third-degree aggravated assault-bodily injury constituted crimes involving moral turpitude).

The invalidation of § 16(b) means that some removable noncitizens may be eligible to apply for relief from removal because non-aggravated felonies do not *automatically* bar such relief. Relief provisions such as cancellation of removal permit the Attorney General to cancel or waive removal in certain circumstances, but noncitizens must meet various criteria to qualify. See, *e.g.*, 8 U.S.C. §§ 1229b(a)(1)(must have had permanent residence for not less than five years); 1182(h)(1)(B) (must show that noncitizen's removal would cause extreme hardship to citizen or permanent resident family member). Significantly though, the Attorney General retains full discretion to deny these applications for relief based, for example, on the seriousness of the prior criminal record. See, *e.g.*, *In re C-V-T-*, 22 I. & N. Dec. 3342 (B.I.A. 1998). Thus, to the extent that § 16(b)'s invalidation may have an impact on the government's ability to deport noncitizens, it is a "limited one." *Moncrieffe*, 133 S. Ct. at 1692 (quoting *Carachuri-Rosendo*, v. *Holder*, 560 U.S. 563, 581 (2010).

Whether he or she ultimately achieves relief from deportation, each noncitizen deserves an opportunity to challenge his or her removal with notice and under a reliable standard free from arbitrariness. Consistent with this Court's holding in *Johnson*, to forever banish a noncitizen from a country that has been his home under "so shapeless a provision...does not comport with the Constitution's guarantee of due process." 135 S. Ct. at 2560.

CONCLUSION

For the foregoing reasons and those stated by Respondent, the Court should affirm the court of appeals' holding that the Section 16 residual clause is unconstitutionally vague.

Respectfully submitted,

EAMON P. JOYCE
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

SEJAL R. ZOTA*
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
14 Beacon Street
Suite 602
Boston, MA 02108
(617) 227-9727
sejal@nipnlg.org

Counsel for Amici Curiae

* Counsel of Record

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